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No. 99-1613

In The

Supreme Court of the United States

ROBERT SHAW; LARRY BEARLEY; MICHAEL MAHONEY; MYRON BEESON; AND RICHARD S. DAY,

Petitioners,

v.

KEVIN MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JOSEPH P. MAZUREK
Attorney General of Montana
DAVID L. OHLER*
DIANA LEIBINGER-KOCH
Special Assistant Attorneys General
1539 Eleventh Avenue
P.O. Box 201301
Helena, MT 59620
(406) 444-5682

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the First Amendment to the United States Constitution grant a state prison inmate an independent and free-standing right to assist another state prison inmate with a pending court case even if the State supplies other forms of legal assistance to the prison inmate?

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INTRODUCTION

Respondent's brief brings to mind the adage about exercising care over what one asks for. In the complaint, Respondent sought a broad declaration against Petitioners' "practice of disciplining inmate law clerks based on the content of their advice to other inmates." J.A. 67-68. The Ninth Circuit agreed, holding that, "the provision of legal assistance to fellow inmates" was a specially protected First Amendment right to which the Montana State Prison's discipline policy could have no application. Pet. App. 2; *see also* Pet. App. 9 ("legal activities on behalf of other inmates implicate[s] associational rights protected by the First Amendment"). The Court of Appeals thus fashioned a right that is not limited to "inmate law clerks" but extends to any inmate purporting to give "legal advice."

In his brief, however, Respondent takes a different tack, characterizing this case as an as-applied challenge to the discipline meted out to him for the communication of facts allegedly material to an ongoing criminal proceeding. *See, e.g.*, Br. Resp. at 17, 30. He argues further that his conduct should not have been characterized as "Insolence" under Rule 009 or "Interference with Due Process Hearings" under Rule 022. *Id.* at 20-23. The latter analysis is curious because Respondent argues that communications related to such "material facts" are immune from application of the disciplinary policy. In effect, Respondent merely substitutes his version of a categorical privilege immunizing inmate conduct from otherwise neutral prison disciplinary regulations for the "legal advice" privilege adopted by the Ninth Circuit.

Respondent's discomfort with the Ninth Circuit's "legal advice" privilege is understandable since, while he secured a result favorable to his interests, the decision embodies a rule of law that cannot be justified under this Court's First Amendment speech or associational right decisions. Respondent concedes as much and makes no effort to justify the Court of Appeals' analysis. Br. Resp. at 9 ("[w]hatever we may say about the reasoning of the lower court in resolving [whether the Respondent was disciplined validly], its judgment was correct"). No less unmeritorious, moreover, is his alternative "inmate witness" or "material facts" privilege, suggested for the first time before this Court.

Respondent's access-to-courts analysis is equally problematic. First, contrary to what might be inferred from his argument, the merits of Respondent's access-to-courts claim are not before this Court. The access-to-courts doctrine is instead relevant because the Ninth Circuit's newly-minted First Amendment right upsets the balance this Court has struck in its access-to-courts jurisprudence between the interest of prisons in safe, orderly administration of inmate populations – an undertaking that this Court has recognized to be both difficult and subject to deferential review by courts – and the interest of prisoners to participate in the legal process with respect to a quite limited class of proceedings directly relevant to the validity or conditions of their confinement. Second, a review of Respondent's arguments concerning the doctrine merely underscores how significantly the Ninth Circuit's "legal advice" privilege expands upon this Court's decisions.

ARGUMENT

I. RESPONDENT RAISES NO SUBSTANTIAL BASIS UPON WHICH TO SUSTAIN THE NINTH CIRCUIT'S "LEGAL ADVICE" PRIVILEGE UNDER THE FIRST AMENDMENT.

The Court of Appeals drew its "legal advice" privilege out of the First Amendment through application of the standard enunciated in *Turner v. Safley*, 482 U.S. 78 (1987). Pet. App. 10-11. Respondent, however, makes no attempt to vindicate the First Amendment right created by the Ninth Circuit. Instead, he employs *Turner* to establish that communications from a potential witness related to an ongoing criminal proceeding are immune from the Prison's disciplinary policy. Br. Resp. at 18-27. This is a new theory, wholly unrelated to that advanced in the complaint, but it suffers from precisely the same flaws as the Ninth Circuit's opinion.

1. Respondent begins his substantive analysis with a discussion of First Amendment decisions, including *In re Primus*, 436 U.S. 412 (1976), and *NAACP v. Button*, 371 U.S. 415 (1963), concerned with speech or associational activities in connection with litigation. Br. Resp. at 12-13. These decisions, as he immediately acknowledges, have no relevance to the outcome here because they arose in a non-prison context. *See also* Br. Pet'rs at 37 n.10 (distinguishing inmate and non-inmate access-to-courts decisions). Where prisons and prisoners are involved, this Court applies a multi-factor reasonableness standard aimed at resolving the question whether the challenged *regulation* "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Indeed, in *Jones v. North*

Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), this Court rejected a challenge to prison regulations based on the free speech and associational rights components of the First Amendment to hold that, "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system' ". *Id.* at 129. Respondent freely admits the facial validity of Rules 009 and 022, i.e., the Montana disciplinary regulations, under which he was sanctioned. ["Murphy did not challenge the Rules on their face"]. Br. Resp. 30. There is consequently no dispute that those rules, including Rules 009 and 022, satisfy *Turner*'s reasonableness standard.

Implicit in Respondent's admission is the recognition that, to the extent any statement in the letter to Tracy constituted "insolence" or an "interference with a due process hearing," they would be cause for discipline as an ordinary matter. Respondent argues at length that nothing in the letter met the elements of the offenses specified in Rules 009 and 022 (Br. Resp. at 20-22), but those arguments beg the more critical question presented by Respondents' Complaint and presented to this Court of whether, even if the statements in the Tracy letter concededly violated the rules, the disciplinary policy could be applied. That is the question the Ninth Circuit answered in its *Turner* discussion and Respondent assiduously avoids in his corresponding treatment of *Turner*. Petitioners' analysis under *Turner* with respect to the issue that was decided below – whether "legal advice" is immune from the disciplinary policy's application – thus stands unrebutted. *See* Br. Petr's at 28-36.

On a related point, Petitioners disagree with amicus curiae United States' suggestion that, should the Court of Appeals' determination concerning the special First Amendment status of "legal advice" be reversed, reweighing under the *Turner* standards would be appropriate. Br. United States Amicus Curiae at 29-30. Given Respondent's repeated acquiescence in the facial legitimacy of Rules 009 and 022 for *Turner* purposes, First Amendment concerns dissipate once the Ninth Circuit's "legal advice" privilege is removed from consideration. That is, because Rules 009 and 022 admittedly contain "neutral" standards of the type required by *Turner* and subsequent precedent, the rules can be applied to inmate speech without First Amendment embarrassment so long as such application is consistent with their terms. *See Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989) ("[w]here, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*").

The United States' reliance on the remand order in *Thornburgh* that application of the facially sustained rule to the publications at issue be considered does not mandate, in Petitioners' view, individualized reweighing under the *Turner* standards. The very objective of prison rules is to establish measures of permissible conduct, and, once those measures have been found or admitted to be constitutionally valid under the *Turner* standards, ad hoc reweighing would be superfluous absent, as here, some claimed exception to the obligation to comply at all with a particular rule. *See O'Lone v. Estate of Shabazz*, 482 U.S.

342 (1987) (challenge by prisoners of Islamic religion to comply with rule restricting return to main prison building during work gang shifts). As discussed *infra*, Respondent has not pursued a due process claim predicated on the absence of a sufficient factual basis for Petitioner Bearley's and Mahoney's determinations. Reconsideration of the propriety of his discipline on remand under the *Turner* standards is therefore unnecessary.

2. Respondent nonetheless advances various contentions during his discussion of the *Turner* considerations that merit comment. *First*, in arguing the absence of any legitimate penological interest in sanctioning him because of statements in the Tracy letter, Respondent states that, "[b]y stretching its Disciplinary Rules to fit Murphy's letter, Montana State Prison extended its authority into the court room where it has no interest in order and discipline." Br. Resp. at 17. "The interests triggered by [his] letter," Respondent adds, "were judicial and evidential." *Id.* at 18. However, the penological interest underlying the disciplinary rules is preventing and, if appropriate, punishing prison conduct deemed inimical to institutional order and safety. J.A. 6 ["Inmate Disciplinary Policy," "Objective: To provide a means of maintaining discipline and enforcing necessary rules within the institution."]. Respondent's position thus proves far too much, since even admittedly *false* statements of fact related to a pending or anticipated judicial proceeding would fall outside the Prison's ability to discipline – a conclusion he readily endorses – because conduct that violated those rules would be immune from punishment if it could be characterized (even falsely) as "legal advice." Br. Resp. at 16 ("[d]etermining the truthfulness

of the information proffered by Murphy for use in a court proceeding was a judicial, not a penological, function"). It further means that his later discussion directed to whether he violated Rules 009 and 022 is as immaterial under his theory as it is under the Ninth Circuit's. In any event, Respondent's remarkable assertion cannot be squared with this Court's repeated admonition that " 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.' " *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128).

Respondent's related argument that his letter to Tracy implicates "[t]he right to participate in the [latter's] trial" (Br. Resp. at 28) and that, therefore, "[t]he witness's interest in giving testimony should be regulated by the court, not by the Prison through its imposition of punishment" (*Id.* at 29) is similarly flawed. Even if one indulges the generous assumption that Respondent had anything material to Tracy's prosecution to testify about, since nothing in the record below suggested that any of the factual allegations in the letter were relevant to Tracy's defense, no decisional support exists for the proposition that prison administrators are precluded from initiating disciplinary proceedings based on neutral rules of conduct merely because those proceedings relate to statements of alleged fact by a potential inmate witness.[1]

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[1] Under Montana law, for example, "the accused must first lay a foundation that he acted in self-defense before he can introduce evidence of the character of the victim." *State v. Cartwright*, 650 P.2d 758, 764 (Mont. 1982). Nothing in the record remotely suggests that Tracy acted in self-defense. *See* Mont. Code Ann. § 45-3-102 (1999) (specifying when use of force in defense of person is permitted).

Indeed, accepting Respondent's position would substitute in practical effect a categorical "inmate witness" immunity from prison discipline for the Ninth Circuit's categorical "legal advice" privilege. The scope of the "inmate witness" privilege proposed by Respondent, moreover, may be even broader than protecting communications from potential witnesses, since he argues at the conclusion of his brief that "[t]his Court should hold . . . that when Prison officials act . . . to prevent communication of material facts to an accused or her attorney, they violate the First and Sixth Amendments and the right of access." *Id.* at 38. Persons other than potential witnesses presumably may have knowledge of "material facts." It thus might be more accurate to describe Respondent's alternative to the Ninth Circuit's holding as the "material facts" privilege. However characterized, it is no more justifiable under controlling First Amendment speech or right-of-association principles than the Ninth Circuit's "legal advice" privilege.[2]

Second, Respondent's parsing of Rules 009 and 022 to establish his claimed innocence of their violation (Br. Resp. at 20-23) is immaterial not only because he sees no legitimate penological interest implicated by any inmate-to-inmate communications concerning judicial proceedings but also because he did not challenge the sufficiency

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[2] Although Respondent makes his *Turner*-based argument with reference to the redefined privilege, the outcome here is unaffected by whether the "inmate witness" or "material facts" privilege is used in lieu of the Ninth Circuit's "legal advice" privilege. The Prison's penological interest is the same as to both, as are the most significant considerations with respect to application of the four *Turner* factors.

of the evidence supporting the Prison's determinations. *See Superintendent v. Hill*, 472 U.S. 445 (1985). His district court complaint thus sought declaratory relief under the Due Process Clause only with respect to the rules' alleged vagueness (J.A. 67), and none of the lower courts' decisions identified a due process claim directed to evidentiary sufficiency as an issue. Respondent thus abandoned any such claim.

Third, the contention that Respondent had no alternative means of conveying the information in the Tracy letter or, presumably, "legal advice" generally, without fear of sanctions is speculative and wrong. Br. Resp. at 23-24; *see also id.* at 27 ("[h]ad Murphy included the same statements in a letter to the press, he would have been subject to the same sanctions"). If he had sent the letter to Tracy's attorney or to other persons outside the Prison, it would not have been opened. MSP 16-001, §§ I.B.2, II.B.4 (J.A. 35, 36).[3] Finally, as Respondent admits (Br. Resp. at 21), nothing precludes a prisoner from complaining about a correctional officer's conduct through the medium of a grievance. MSP Policy 15-001, Procedures § B, Rule 022 (J.A. 14).

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[3] Moreover, a more stringent standard of review exists as to whether the disciplinary rule policy may be applied to outgoing correspondence regardless of its content. *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974); *see Thornburgh*, 490 U.S. at 413 ("[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials").

Fourth, that prison employees review inmate-to-inmate mail [4] and, as here, may initiate disciplinary proceedings based on matters discussed in the correspondence does not mean, as Respondent supposes, that determining whether a particular letter contains "advice material to an inmate's criminal case" will not impose any additional burden. Resp. Br. at 25. Petitioners discussed in their opening brief the difficulties that may attend distinguishing "legal advice" from other types of content. Br. Petr's at 33-35. Respondent is hardly clear himself on this issue, characterizing the letter to Tracy in the opposition to the petition as "witness language, not lawyer language" (Br. Opp'n Pet. Writ Cert. at 4) and then arguing in his merits brief that the letter "attempted to bring a potential defense to Tracy's attention" (Br. Resp. at 36). Indeed, under Respondent's view, prison officials would be prohibited from evaluating whether a prisoner's bald claim that a letter contained "legal advice" was false because, according to Respondent, such determinations are "judicial" not "penological." (Br. Resp. at 16). Given the uncertain line that separates legal from non-legal speech, much less "material" from "immaterial" speech related to a legal proceeding, Respondent has not carried his burden of showing that the need to cull out "legal advice" will impose no more than a de minimis burden. *See Turner*, 482 U.S. at 93.

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[4] The Respondent and Amici for Respondent mischaracterize the Prison's policy as permitting inmate correspondence between all inmates generally. The evidence in the record demonstrates that only inmate law clerks, not all inmates, are permitted to correspond with inmates in the Maximum Security Unit. (J.A., p. 87).

II. RESPONDENT'S ACCESS-TO-COURTS ANALYSIS MERELY REINFORCES THE CONCLUSION THAT, IF ACCEPTED, THE NINTH CIRCUIT'S FIRST AMENDMENT-BASED "LEGAL ADVICE" PRIVILEGE WOULD OVERRIDE THE BALANCE STRUCK BY THIS COURT BETWEEN PRISON AND PRISONER INTERESTS.

The Ninth Circuit did not reach Respondent's access-to-courts claim. Pet. App. 15. Petitioners nonetheless viewed that doctrine's scope as germane to resolving the question whether the lower court erred in creating a freestanding "legal advice" right under the First Amendment. Br. Petr's at 41-45; *see also* Br. United States Amicus Curiae at 15-19; Amicus Curiae Br. States Florida et al. at 4-6; Br. Amicus Curiae Crim. Justice Legal Found. at 5-8. The doctrine's relevance additionally was discussed in the petition. Pet. Writ Cert. at 18-19.

That said, the actual merits of Respondent's access-to-court claim are not before this Court because that issue is not encompassed within the question presented. Petitioners therefore treat his arguments as addressed to whether the Ninth Circuit's "legal advice" privilege expands the access-to-courts doctrine presently marked out by this Court and thereby serves to interfere with that doctrine's attempt to balance the interest possessed by prison administrators in institutional order and security and the interest of the incarcerated in contesting their incarceration or the conditions attendant to it. Whether the doctrine *should* be expanded must be left for another day when the merits of Respondent's or a similarly-

situated inmate's access-to-courts claim are before the Court.

Respondent's arguments regarding the access-to-courts doctrine is contrary to controlling precedent. He contends that the term "right of access to the courts" constitutes "a shorthand for two unrelated sets of circumstances" with corresponding duties. Br. Resp. at 33. The first of these "sets of circumstances" imposes on prison administrators "a duty of non-interference with a prisoner's right to defend against criminal charges," while the second requires them "to ensure that a prisoner may bring post-conviction relief petitions and challenges to the prisoner's conditions of confinement." *Id.* at 11. Respondent's discipline is alleged to have violated the first duty. *Id.* at 34. Such a reconfiguration of the access-to-courts doctrine cannot be squared with this Court's decisions.

Respondent cites no apposite authority either for his proposed bifurcation of the access-to-courts doctrine into two "prongs" (Br. Resp. at 11) or for the more general notion that, in a penal incarceration context, it extends beyond providing "tools . . . inmates need to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Indeed, the Court in *Casey* held that the "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* at 355.

Respondent's reliance on *Procunier v. Martinez, supra*, for the first of those prongs is plainly mistaken. That case was concerned with, in relevant part, a ban on the use of

law students and paraprofessionals to conduct client interviews on behalf of attorneys representing inmates. 416 U.S. at 419. This Court concluded that the prohibition "inhibited adequate professional representation of indigent clients" and was not otherwise justified under the "necessary to the furtherance of an important or substantial governmental interest" standard of review established in that decision and subsequently revisited in *Turner* and *Thornburgh*. *Martinez*, 416 U.S. at 420. As discussed in Petitioners' principal brief and reiterated in Part I above, the Ninth Circuit's "legal advice" privilege does not withstand scrutiny under the *Turner* standards. Respondent's suggestion that *Martinez* supports extending the access-to-courts doctrine to ongoing criminal prosecutions against prisoners represented by counsel also fails to account for the Court's statement there that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights." *Id.* at 419. *Martinez* thus is consistent with *Lewis* and *Bounds v. Smith*, 430 U.S. 817 (1977), as to the doctrine's reach. Under the most straightforward of linguistic analyses, a prisoner who has been summoned into court for the purpose of defending against criminal charges can hardly argue that he is being denied *access* to the courts.[5]

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[5] No less unavailing is Respondent's reliance on *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970) (per curiam), *aff'd per curiam*, 404 U.S. 15 (1971). Br. Resp. at 34. *Gilmore* involved a claim that the California Department of Corrections failed to provide adequate "access to law books, legal materials, and lay

Lastly, Respondent's discussion of standing to maintain an access-to-courts claim is notable for its introductory statement that his status, or "role," as an inmate legal clerk, while "not critical to the resolution of the free speech issue, . . . is necessary to the access to the courts issue."[6] Br. Resp. at 34. If that assertion is accepted for argument purposes, it concedes Petitioners' position that the Ninth Circuit's decision, aside from enlarging the reach of the access-to-courts doctrine beyond challenges to existing sentences and confinement conditions, increased the class of prisoners who can assert claims under the court's new constitutional rule since the "legal advice" privilege is not restricted to inmate legal clerks.

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assistance in preparing prisoner writs and complaints." *Id.* at 107. To the extent the district court there construed the access-to-courts doctrine as including "all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him," it associated the right in a criminal proceeding with appointment of counsel. *Id.* at 110. Tracy, of course, had counsel. This Court in *Bounds* referred to its summary affirmance of *Gilmore* but did not suggest that the access-to-courts right it applied extended to proceedings other than challenges to existing sentences or conditions of confinement. *Bounds*, 430 U.S. at 828-29.

[6] Contrary to Respondent's argument that interests of law clerks and their "clients" are coterminous, Br. Resp. 35, this Court has recognized that the interests of inmate "law clerks" and the inmates that they purportedly serve can diverge widely. *See, Johnson v. Avery*, 393 U.S. 483 (1969) [noting that jailhouse lawyers "are sometimes a menace to prison discipline"]; *Id.* at 488 ["Codes of ethics, champerty, and maintenance, frequently have little meaning to a jailhouse lawyer, who solicits business as vigorously as he can." (White, J., with Black, J., dissenting)]; *Id.* at 500.

The same must be said about Respondent's "inmate witness" or "material facts" privilege. Beyond this fundamental difficulty with Respondent's standing argument lies the unique factual circumstances here – i.e., his attempt to assert what he admits is "the assisted inmate's right of access" (*id.* at 35) when Tracy had an appointed counsel who labored under a Sixth Amendment-based duty to provide effective representation. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Hanson*, 940 P.2d 1161, 1172-73 (Mont. 1997). Not only must it be presumed, in the absence of a contrary showing below, that Tracy's attorney conducted a reasonable investigation before his client entered into a plea agreement, but there was also no indication that Tracy, once informed of the letter's content, deemed it appropriate to initiate postconviction proceedings under Montana law alleging either a violation of the prosecution's obligation to disclose exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), or ineffective assistance of counsel. *See* Mont. Code Ann. § 46-21-101 to -203 (1995).[7] Respondent's contention that he is a proper party to advance Tracy's alleged right of access to the courts – which Respondent urges arises in part under the Sixth Amendment (Br. Resp. at 34) – when Tracy has elected

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[7] At the time this controversy arose, Montana law required postconviction relief proceedings to be initiated within five years of conviction. Mont. Code Ann. § 46-21-103 (1995). Tracy's affidavit in the proceeding below indicates that he received a copy of the February 1995 letter in June 1996. Aff. Pat Tracy ¶ 11 (J.A. 84). Respondent's apparent suggestion that Tracy's ability to challenge the conviction arising from his plea agreement was affected in some fashion by Petitioners' conduct is thus groundless. *See* Br. Resp. at 29.

not to do so himself is fraught with difficulty that his brief fails to address. That difficulty, however, is absent from the "legal advice" privilege because the First Amendment right lying at its core is shared by both Respondent and Tracy.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General

DAVID L. OHLER*
DIANA LEIBINGER-KOCH
Special Assistant Attorneys General
1539 Eleventh Avenue
P.O. Box 201301
Helena, MT 59620
(406) 444-5682

Counsel for Petitioners

**Counsel of Record*